Supreme Court, U.S.
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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief for the Petitioners Gregory F. Wersal, et al.

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January 17, 2002

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QUESTION PRESENTED

Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings below:

Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gregory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; *Petitioners*;

Verna Kelly was, in her official capacity, Chairperson of the Minnesota Board of Judicial Standards, and has been succeeded by Suzanne White, present Chairperson of the Minnesota Board of Judicial Standards; Edward J. Cleary, in his official capacity as Director of the Minnesota Office of Lawyers Professional Responsibility; Charles E. Lundberg, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; *Respondents*.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The decision of the court of appeals denying petitions for rehearing and rehearing en banc, Appendix to *Petition for Writ of Certiorari* (" P. App.") 130a, is not yet reported. The opinion of the court of appeals, P. App. 1a-93a, is reported at 247 F.3d 854. The opinion of the district court, P. App. 94a-129a, is reported at 63 F. Supp. 2d 967.

JURISDICTION

The judgment of the United States Court of Appeals for the Eight Circuit was entered on April 30, 2001. P. App. 7a. Motions for Rehearing and Rehearing En Banc were denied on June 26, 2001. P. App. 130a. A Petition for Writ of Certiorari was filed on September 24, 2001, and Question One of the Petition was accepted for review on December 3, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL & REGULATORY PROVISIONS

The First and Fourteenth Amendments to the United States Constitution and 42 United States Code § 1983 are printed at pages 1-2 of the *Petition for a Writ of Certiorari*. Canon 5 of the Minnesota Code of Judicial Conduct is printed in the Appendix to said *Petition* at 131a-135a.

STATEMENT OF THE CASE

This is a suit challenging Minnesota's Code of Judicial Conduct's Canon 5A(3)(d)(i) - the "announce clause" - which absolutely bars judicial candidates from

announcing their views on disputed legal or political issues during judicial campaigns. The suit claims that the clause unconstitutionally restricts the rights to freedom of speech guaranteed in the First and Fourteenth Amendments to the U.S. Constitution.

Article VI, § 7, of the Minnesota Constitution requires that all judges stand for election every six years. The Justices of the Minnesota Supreme Court adopted a Code of Judicial Conduct ("Code") that governs the conduct of Minnesota's judges, including Canon 5, which governs candidate conduct during judicial elections. Canon 5A(3)(d)(i) prohibits a judicial candidate from, in relevant part, "announc[ing] his or her views on disputed legal or political issues" during judicial campaigns ("Announce Clause"). P. App. at 133a-134a. Additional Minnesota canons also restrict the conduct of the judicial candidate's family and others subject to the candidate's influence: (1) Canon 5A(3)(a) provides that the judicial candidate "shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate" (P. App. at 133a); (2) Canon 5A(3)(b) provides that the judicial candidate "shall discourage other employees and officials subject to the judicial candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing [under the Code]" (P. App. at 133a); and (3) Canon 5B(3)(c) prohibits judicial candidates to "knowingly permit any other person to do for the candidate what the candidate is prohibited from doing [under the Code]." P. App. at 133a.

Finally, judicial challengers are also subject to the

restrictions contained in Canon 5 through incorporation into the Minnesota Rules of Professional Conduct. Article VI, § 5, of the Minnesota Constitution requires that all judges be "learned in the law" – i.e., all judges and judicial candidates must be admitted to practice before the Minnesota courts. *Sylvestre v. State*, 214 N.W.2d 658 (Minn. 1978). The Minnesota Supreme Court has adopted the Minnesota Rules of Professional Conduct, which govern the conduct of attorneys admitted to practice before Minnesota courts. Rule 8.2 (b) of the Rules provides that "a lawyer who is a candidate for judicial office shall comply with the applicable provisions of the [Code]." Therefore, judicial challengers are subject to sanctions under the Rules of Professional Conduct if they violate Canon 5 during a judicial campaign.

1. *Parties.* Petitioner Gregory Wersal is 46 years old, graduated summa cum laude from St. John's University in Collegeville, Minnesota and cum laude from the University of Minnesota Law School in 1980 and was admitted to practice law before Minnesota state courts in 1980. Joint Appendix ("J.A.") at 3, 36. In 1998, Petitioner Wersal campaigned for election to an associate justice seat on the Minnesota Supreme Court and formed his campaign committee, the Campaign for Justice. J.A. at 5. As an attorney admitted to practice law in Minnesota Wersal was subject to professional sanctions if he violated Canon 5. During his 1998 campaign, Wersal did not announce to Minnesota voters his general views on disputed legal or political issues because of his fear that he would be subject to sanctions for violating the Announce Clause. J.A. at 9-

10.

The Republican Party of Minnesota ("RPM") and its related affiliated organizations – Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, and the Minnesota African-American Republican Council are – private associations. The primary purpose of these associations is to elect to public office RPM endorsed candidates with the intent of promoting government policy. More specifically, RPM seeks to endorse candidates to judicial offices in Minnesota with the intent of promoting administrative and judicial policies of the judicial branch. In order to promote its policies through the endorsement of judicial candidates, RPM must hear the general views of those prospective candidates on disputed legal or political issues. J.A. 294, 298-306. However, as a result of the Announce Clause, RPM has been unable to learn such views from the candidate or her close supporters. J.A. 294, 298-306.

Petitioner Cheryl Wersal is the wife of Petitioner Greg Wersal. Petitioner Mark Wersal is the brother of Greg Wersal and a member of his campaign committee. Mark Wersal is also an attorney admitted to practice law in Minnesota and a partner with Greg Wersal in a private law practice. Both Cheryl Wersal and Mark Wersal supported Greg Wersal's candidacy to the Minnesota Supreme Court and both wished to announce to Minnesota voters their knowledge of Greg Wersal's general views on disputed political and legal issues. However, because Canons 5A(3)(a), (b) and (c) subject judicial candidates to sanctions based on the conduct of

their supporters, both Mark Wersal and Cheryl Wersal refrained from announcing their knowledge of Greg Wersal's general views on disputed legal or political issues, due to their concern it would subject Wersal to sanctions from Respondent, the Minnesota Office of Lawyers Professional Responsibility ("OLPR"). Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District Court Docket #85 at 4.

Corwin Hulbert is a 40 year old Minnesota citizen who supported Greg Wersal's candidacy to the Minnesota Supreme Court. Corwin Hulbert wished to announce to Minnesota voters his knowledge of Greg Wersal's general views on disputed political or legal issues. However, because Canons 5A(3)(a), (b) and (c) subject judicial candidates to sanctions based on the conduct of their supporters, Corwin Hulbert refrained from announcing his knowledge of Greg Wersal's general views on disputed political or legal issues due to his concern that such an announcement would subject Wersal to sanctions by the OLPR and thus harm Wersal's candidacy. Corwin Hulbert Affidavit, District Court Docket #56 at 2, 4, 9.

Michael Maxim is a Minnesota citizen and a member of the RPM. He attended the 1998 RPM state convention as a delegate. During the 1998 RPM state convention, Maxim made a motion to endorse judicial candidates. Unlike Cheryl and Mark Wersal and Corwin Hulbert, Michael Maxim did not know Greg Wersal or his campaign committee and did not have sufficient first-hand knowledge of Greg Wersal's general views on disputed legal or political issues. This was also true of most of the delegates to the 1998 RPM

state convention. Michael Maxim wished to hear someone, and particularly Greg Wersal, announce Wersal's general views on disputed political or legal issues as part of the motion to endorse. However, because of the Announce Clause, neither Michael Maxim nor any of the other RPM convention delegates was able to learn Wersal's views from Wersal or any of his close supporters. Declaration of Michael Maxim, District Court Docket #72 at 1-3.

The Minnesota Board on Judicial Standards ("BOJS") was created to enforce disciplinary standards for judges, including the Canons contained in the Code. Minn. Stat. § 490.15-.16. If a Minnesota judge violates any of the Canons, the BOJS is authorized to make recommendations to the Supreme Court that the judge be sanctioned. Minn. Stat. § 490.16 subd. 3. (Only the Minnesota Supreme Court can sanction a judge.) Sanctions include, but are not limited to, removal from judicial office. Minn. Stat. § 490.16 subd. 3.

The OLPR was created to enforce the Minnesota Rules of Professional Conduct. The OLPR receives and investigates ethical complaints against attorneys involving violations of Canon 5 and conducts hearings and issues dispositions on those complaints. *See* Minnesota Rules on Lawyers Professional Responsibility, Rule 12. Sanctions can include, but are not limited to, suspension from the practice of law.

2. *Background.* In 1996, Wersal launched a campaign for the office of Associate Justice of the Minnesota Supreme Court. J.A. at 3-4. During the 1996 campaign, Wersal, members of his campaign committee, his wife Cheryl Wersal, his brother Mark Wersal, Corwin Hulbert, and other members of the RPM and its affiliated associations announced that Wersal was in favor of strict construction of the Constitution. J.A. at 34, Mark Wersal Affidavit, District Court Docket #13 at 4; Cheryl Wersal Affidavit, District Court Docket #11 at 1; Corwin Hulbert Affidavit, District Court Docket #12 at 1-2; and Anthony Sutton Affidavit, District Court Docket #8 at 1-2.

Wersal also distributed campaign literature critical of two Minnesota Supreme Court decisions: (1) *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), in which the Minnesota Supreme Court held that the Minnesota Legislature's refusal to provide welfare medical benefits for abortions violated a women's right to an abortion, and (2) *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), in which the Minnesota Supreme Court held that the Minnesota Constitution required that Minnesota prosecutors tape record confessions in order for those confessions to be admitted into evidence. J.A. 37-38. Wersal's campaign literature criticized the majority opinion in *Doe* for the same reasons as set forth in *Doe's* dissenting opinion. J.A. at 38.

As a result of Wersal's campaigning at RPM meetings, an ethical complaint was filed against Wersal with the OLPR on May 22, 1996. In addition to other complaints, the anonymous complaint charged that Wersal's campaign literature, signed by Petitioner Mark Wersal, stating that "Wersal believes we need judges who will strictly construe the Constitution and who will not legislate from the bench," as well as statements critical of three Minnesota Supreme Court deci-

sions, violated the Announce Clause. J.A. at 12-15, 19.

After completing its initial investigation of the ethical complaint made against Wersal, the OLPR dismissed the complaint. J.A. at 16-23. With respect to the Announce Clause, the OLPR specifically expressed its doubts regarding whether the Announce Clause violated the First Amendment's free speech guarantee. J.A. at 19-21. Although Wersal also believed that the allegations against him either did not violate Canon 5 or were unconstitutional, he was unwilling to put his legal license at risk of further complaints - Which one individual specifically told Wersal he would do despite the fact that the OLPR had dismissed the earlier complaint. J.A. at 46-48. As a result of the ethical complaint, Wersal withdrew his candidacy for a seat to the Minnesota Supreme Court. J.A. at 4-5.

In January, 1997, Wersal announced that he would again be a candidate for Associate Justice to the Minnesota Supreme Court in the November 1998 general election. J.A. at 5. As a result of the ethical complaint made during the 1996 campaign, neither Wersal nor his wife, his brother and other supporters announced Wersal's general views on disputed legal and political issues. J.A. at 9-10, 112-115.

On February 9, 1998, Wersal requested an advisory opinion from the OLPR, inquiring whether the OLPR intended to enforce, among other things, the Announce Clause in conjunction with Wersal's 1998 judicial campaign. J.A. at 10. OLPR responded, stating, with respect to the Announce Clause, that it "continues to have significant doubts as to whether or not

this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution." J.A. at 32. However, the OLPR specifically refused to state that it would not enforce the Announce Clause. The OLPR would simply continue to choose at this time to exercise its prosecutorial discretion and not prosecute Wersal for a violation of the Announce Clause. J.A. at 32. As a result, during Wersal's 1998 judicial campaign, Wersal did not announce his general views on disputed legal or political issues and he instructed his family members, including his wife Cheryl Wersal, and Mark Wersal, as well as his supporters, such as Corwin Hulbert, to also not announce Wersal's general views on disputed legal or political issues. J.A. at 9-10, 112-115; Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District Court Docket #85 at 4.

Not only did Wersal want to announce his general views on certain disputed legal or political issues to the Minnesota electorate, the RPM wanted to hear Wersal's views to determine whether to endorse his candidacy. J.A. at 294, 296-298. The RPM's delegates could not intelligently evaluate endorsing Wersal's judicial candidacy without knowing Wersal's general views on disputed political or legal issues. J.A. at 297-298. The RPM and its delegates were concerned that in absence of knowledge of Wersal's views, the RPM could not properly endorse Wersal. J.A. 293-294, 297-298. However, Canon 5 prevented Wersal and his closest supporters from announcing Wersal's views. J.A. at 9-10, 112-115; Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District

Court Docket #85 at 4.

In addition, because of the ethical complaints filed against Wersal in conjunction with his 1996 campaign, RPM officials were concerned with the potential political damage not only to Wersal, but also to the RPM and its other political candidates, if the OLPR or Minnesota Supreme Court sanctioned Wersal. J.A. 47, 292, 304-305. Therefore, if the RPM decided to move forward with an endorsement in 1998, it would have to do so without access to any expression of Wersal's general views by the candidate or those associated with him and at some political risk.[1] Nonetheless, at the June 1998 RPM State Convention, delegate Michael Maxim made a motion to that the RPM endorse Wersal to the Supreme Court. The endorsement motion failed by a narrow margin of 344 to 390 votes. J.A. at 297, Declaration of Michael Maxim, District Court Docket #72 at 2.

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[1] The concerns of the RPM and Wersal were well founded. In the 1992 elections, Minnesota attorney Michael DeMoss ran for the seat of Chief Justice of the Minnesota Supreme Court. Affidavit of J.A. at 254-256. During his campaign, DeMoss stated "the unborn child is a human being, has constitutional rights, and the State of Minnesota needs to protect those rights." J.A. at 260. After learning of DeMoss' statements, the BOJS filed an ethical complaint with the OLPR against DeMoss. State newspapers immediately reported that the BOJS had filed a ethical complaint against DeMoss that derailed DeMoss' campaign. J.A. 254-255. The OLPR finally determined that discipline was not warranted and dismissed the complaint as a matter of prosecutorial discretion – but only well after the November 1992 election. J.A. at 255. The damage to DeMoss' campaign had been done.

3. *Procedural History*. On February 27, 1998, Petitioners filed suit under 42 U.S.C. §1983 requesting declaratory and injunctive relief against various provisions of Canon 5, including the Announce Clause, in the U.S. District Court for the District of Minnesota. While expressing doubts regarding the constitutionality of the Announce Clause, the district court denied Petitioners' Motion for a Preliminary Injunction. *Republican Party of Minnesota v. Kelly*, 996 F. Supp. 875, 879 (D. Minn. 1998). Wersal and the RPM appealed to the U.S. Court of Appeals for the Eighth Circuit and filed emergency motions for injunctive relief in both the Eighth Circuit and this Court. Both motions were denied. On October 28, 1998, in a 2-1 per curiam opinion, the Eighth Circuit affirmed the district court Order. *Republican Party of Minnesota v. Kelly*, 163 F.3d 602 (8th Cir. 1998).

Upon remand, on March 12, 1999, both Petitioners and the State filed cross motions for summary judgment. On September 14, 1999, the district court denied Petitioners' and granted the State's Motion for Summary Judgment, after applying a narrowing construction to the Announce Clause to save it from constitutional attack. *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 983-986 (D. Minn. 1999); P. App. 123a-129a.

Petitioners appealed to the Eighth Circuit on October 12, 1999. The Eighth Circuit heard oral arguments, on May 10, 2000, on an expedited schedule. On April 30, 2001, the Eighth Circuit, in a 2-1 opinion, affirmed the district court's Order. *Republican Party of Minnesota v. Kelly*, 247 F.3d. 854 (8th Cir. 2001); P. App. 1a-

93a. Among other things, the Eighth Circuit accepted the district court's construction of the Announce Clause to forbid judicial candidates from announcing their views on disputed legal or political issues only with regard to matters likely to come before a court, then upheld the clause under the First Amendment. P. App. 43a-52a.

In dissent, Judge Arlen Beam rejected the construction adopted by the district court, because "it does not, in fact, effectively limit the prohibitive scope of the clause, so that the clause continues to roam far beyond the narrow category of speech left unprotected" under the First Amendment. P. App. 77a. The Eighth Circuit denied Petitioners' Motions for rehearing and en banc reconsideration, on a 6-3 vote, on July 19, 2001. Petitioners filed their *Petition for Writ of Certiorari* on September 24, 2001, and this Court accepted review of Question 1 on December 3, 2001.

SUMMARY OF ARGUMENT

Petitioners filed this action alleging that the Announce Clause, Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(i), Pet. App. 134a, unconstitutionally restricts their rights to freedom of speech as guaranteed in the First and Fourteenth Amendments to the U.S. Constitution. The State argues that the Announce Clause is narrowly tailored to serve its compelling state interest of preserving the independence and impartiality of the Minnesota judiciary. Petitioners' counter that the Announce Clause is not narrowly tailored to serve the State's alleged compelling interest.

First, Minnesota's elective judicial selection process requires that all Minnesota judges stand for competitive elections every six years. Minn. Const. art. VI, §§ 7 and 8. Moreover, judges appointed to the bench by the governor to fill a vacancy must stand for election in the next general election more than one year after their appointment in order that the judge has sufficient time to develop a record for the voters to evaluate. The Announce Clause, which provides that no candidate for judicial office may "announce his or her views on disputed legal or political issues," completely circumvents the purpose and structure of the Minnesota elective judicial system - Holding Minnesota judges accountable to the electorate every six years in open, competitive elections.

Second, the history of judicial elections in the United States reveals that dating from the early 19th century, States began amending their constitutions to change from an appointed judiciary to an elected judiciary to provide for judicial accountability because of the widespread perception that appointed judges only served the interests of male property owners who held the exclusive franchise (and thereby controlled judicial appointments). By the time of the Civil War, 24 of 34 States had established elected judiciaries. As new States were admitted to the Union after the Civil War, every State adopted popular election of some or all judges until the admission of Alaska in 1959. To this day, 33 states use popular elections to select or retain some or all of their judges.

Likewise, Minnesota's 1857 Constitutional Debates reflected the Union's preference to subject judicial officers to elections in order to maintain this "elective

check" over the judicial branch:

> I say than that in order to correct the errors of Judges – and it may be important to correct them – the office should be made elected. The community is capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained. . . .

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503. (Lafayette Emmett, first Chief Justice of Minnesota, speaking)

Minnesota has retained its elective judicial system since 1857, even in the face of several opportunities and efforts to modify or abolish it in preference of appointive selection or retention models.

Finally, Minnesota's judges, through their common lawmaking and constitutional interpretive authority, exercise great power to make law in Minnesota. Minnesota's constitutional requirement that judges stand for election reflects the basic democratic principal underlying self government - the citizens are sovereign and should only be subject to laws to which they have consented. Subjecting judges to elections provides Minnesota citizens with the ability to provide "consent" to judicial common lawmaking.

The Announce Clause, by restricting information provided to the voters in a judicial elections, contradicts the very purpose for which Minnesota originally established and continues to retain an elected judiciary - to hold judges accountable for their decisions in office and exercise consent to judicial common lawmaking.

Third, the ABA, which first developed the Announce Clause as part of its Model Code of Judicial Conduct, has since abandoned the Announce Clause due to its belief that the Clause is unconstitutional. Despite the fact that the OLPR, the BOJS and Minnesota Supreme Court's own Advisory committee have all expressed similar concerns that the Announce Clause is unconstitutional, the Minnesota Supreme Court has refused to abandon the Announce Clause in Minnesota.

Fourth, the Announce Clause violates core First Amendment principals. Primarily, it constitutes an absolute ban on content based speech in the midst of an election campaign for public office. *Brown v. Hartlage*, 456 U.S. 45, 53 – 54 (1982). With respect to incumbent judges, the Announce Clause prevents incumbent judges from responding to attacks based on the incumbent's record. However, while incumbent judges can still "announce" their views on disputed legal issues to the electorate through the issuance of published opinions, the Announce Clause prevents judicial challengers from similarly "announcing" to the electorate their views on those very same issues - Even to the point of not allowing challengers to "announce" that they agreed with either the majority or dissenting opinion.

However, the most critical First Amendment issue at stake in this case is not the judicial candidate's right to speak, but rather the public's right to hear the candidates' views from the candidates' themselves in order to intelligently hold judges accountable during the elections. While the State makes the argument - completely at odds with the principles underlying self government - that the public's knowledge of the candi-

date's views will result in the public electing a biased and partial judiciary, the State presents no facts to support this argument. In fact, numerous facts demonstrate that Minnesota's citizens desire an impartial judiciary every bit as much as the State. Minnesota's citizens have provided for a judicial system of overlapping procedures to ensure due process. It is in the citizens' own self interest to have an impartial judiciary in the event they are ever a party in court. Finally, other states which have voted incumbent judges out of office have done so because the incumbent was viewed as biased. Minnesota's citizens undeniably desire an impartial judiciary and have provided for judicial elections to ensure Minnesota has an impartial judiciary.

Fifth, the State, the District Court, and the Eighth Circuit have all proposed different glosses on the Announce Clause. However, the interpretations they offered do not substantially limit the scope of the clause and cannot be justified by the plain language or context of the clause. As a result, the Announce Clause is unconstitutionally vague.

Finally, by cross reference to the Brief of co-Petitioner's RPM, et al, Petitioner Wersal and his campaign committee also argue that no compelling state interest justifies the Announce Clause and that the Announce Clause is not narrowly tailored to satisfy any compelling state interest.

ARGUMENT

I. The Integrity Of The Minnesota Elective Judicial Selection Process Requires That Judicial Candidates Be Allowed To Express – And Voters Be Allowed To Hear – The Candidates' General Views On Disputed Legal Or Political Issues.

A. The Structure Of The Minnesota Judicial Selection Process Assumes That Judicial Candidates May Express – And Voters May Hear – The Candidates' General Views On Disputed Legal Or Political Issues.

The Minnesota Constitution mandates the election of judges to all judicial offices in Minnesota – including the Supreme Court – and specifies that the term of office of all judges shall be six years. Minn. Const. art VI, § 7. Although the Minnesota Constitution empowers the governor to fill any judicial vacancies by the power of appointment, Minn. Const. Art. VI, § 8 mandates that judges appointed to the bench must stand for election at the next general election more than one year after their appointment. Thus, Minnesota has open judicial elections involving candidates competing for the judicial seat – not retention elections. This competitive and adversarial structure assumes that judicial candidates will stand and engage in a vigorous public debate providing information to the electorate.

Moreover, the six year term limit provides voters the opportunity to periodically evaluate the judge's performance in office. Similarly, Minnesota amended Minn. Const. Art. VI in 1972, changing the period of

time in which a judge initially appointed by the Governor must stand for election from not less than 30 days after appointment to not less than one year nor more than two years after appointment. Minn. Const. Art. VI, § 8. The Minnesota Supreme Court found that the reason for this amendment was to ensure that the appointed judges would have sufficient time on the bench to have developed a record of judicial decisions which the electorate can evaluate in determining whether to elect the judge to a full six year term. *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992).

The Announce Clause is antithetical to the purpose underlying Minnesota's constitutional structure that limits judicial tenure and requires judicial elections. The Announce Clause denies voters the information they need to intelligently exercise their franchise. Moreover, it proscribes effective discussion of an incumbent judge's record, which is completely at odds with limiting the term of the judicial office in order that the voters can review the judge's judicial performance.

B. The History of Judicial Elections Demonstrates That Voters Intended To Have Access to the Judicial Candidates' General Views On Disputed Legal Or Political Issues.

1. The Appropriate Selection System for Judges Is A Disputed Issue Throughout Our Nation's History.

The mechanism for selecting and retaining judges has been much debated throughout American history.

During the colonial era, the English King selected colonial judges who served at the Crown's pleasure. Not surprisingly, the Crown constantly abused its control over the colonial judiciary, primarily by removing judges who made decisions the Crown did not like.[2] The Colonists ultimately viewed the colonial courts and judges not as independent arbiters of cases or controversies, but rather as mere extensions of the Crown's power – a significant factor in the Colonists declaring independence in 1776.[3] As a result of this experience, the Founding Fathers structured the federal judiciary as an independent third branch of government providing for the appointment of judges with lifetime tenure, subject only to removal by impeachment. Larry C. Berkson, *Judicial Selection in the United States, A Special Report*, 64 Judicature 176 (1980) ("*Special Report*").

Similarly, the original 13 States provided for appointment of judges – either by the governor, legislature, or an executive council – with all but New Jersey

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[2] The Crown's absolute power of appointment and removal of judges, and the Crown's abuse of this power for short term political gain, played a significant factor in the Glorious Revolution of 1688 and the downfall of the Stuart Kings, and it continued well into the American Revolutionary War. Evan Haynes, *Selection and Tenure of Judges* 51-79 (1944) ("*Selection and Tenure*"); Harry Stumpf, *American Judicial Politics* 133 (2nd ed. 1998).

[3] The Declaration of Independence lists as one of the reasons for declaring independence that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

and Pennsylvania providing judges with lifetime tenure or tenure conditioned on good behavior. *Id.; see also Selection and Tenure* at 101-135. Almost immediately, however, the judicial appointment and tenure system came under severe attack. Citizens resented the fact that property owners, through their exclusive control of the franchise, selected all government officers, including judges.[4] Resentment over the lack of universal suffrage ultimately culminated in the historical movement now known as Jacksonian Democracy[5] – which, among other things, fostered the popular election of judges.

Beginning in 1812, Georgia amended its constitution to provide that judges of inferior courts would be popularly elected as opposed to appointed. Other States soon followed, either joining the Union with or amend-

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[4] When the Republic was founded, the franchise resided almost exclusively with property owners who controlled the legislature and executive – and thus judicial appointments. The experience of the non-franchised, non-property owning citizens with the judiciary was primarily limited to appearing before judges appointed by the franchised-property owning citizens to enforce their debts – a situation that only fostered resentment. *Selection and Tenure* at 85-91.

[5] The political concept underlying the Jacksonian movement was popular sovereignty. The most visible result of the Jacksonian Democracy movement was the extension of the franchise to all males regardless of whether they owned property and the abolition of judicial appointments in favor of judicial elections. By 1820, even Thomas Jefferson was advocating the popular election of judges. *Selection and Tenure* at 93-95.

ing their existing constitutions to provide for judicial elections.[6] By the time of the Civil War, 24 of 34 States had established elected judiciaries. Every State admitted to the Union after the Civil War adopted popular election of some or all judges until the admission of Alaska in 1959. *Selection and Tenure* at 99-101; *Special Report* at 176.

To this day, the vast majority of states continue to use some form of election in choosing and retaining judges. 35 states require open competitive elections in some form to select or retain some or all of their judges.[7] Partisan elections are held to select all or

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[6] New York amended its Constitution changing from an appointed judiciary to an elected judiciary at the New York Constitutional Convention of 1846. The benefits of the change were so self evident that one writer at the time commented: "The debates on an elective judiciary were brief; there was apparently little need to discuss the use of the appointive system, or its failures, or why election would be better." *Special Report* at 176.

[7] Twenty states require almost entirely elective judicial systems. Ark. Const. art. 7, §§ 6, 17; Idaho Const. art. VI, § 7; Ill. Const. art. VI, § 12; Ky. Const. § 117; La. Const. art. V, § 22; Mich. Const. art. VI, §§ 2, 8, 12; Minn. Const art. 6, § 7 & Minn. Stat. § 480B.01 (2001); Miss. Const. art. 6, § 145; Nev. Const. art. 6, §§ 3, 5; N.M. Const. art. VI, § 33; N.C. Const. art. IV, §§ 9-10, 16; N.D. Const. art. 6, §§ 7, 9; Ohio Const. art. IV, § 6; Okla. Const. art. VII, § 3; Or. Const. art. VII, § 1; Pa. Const. art. 5, § 13; Tex. Const. art. V, §§ 2, 7; Wash. Const. art. IV, §§ 3, 5; W. Va. Const. art. VIII, §§ 2, 5; Wis. Const. art. VII, § 9.

Fifteen states select their judiciaries in hybrid manners, utilizing both elective and appointive methods. Ala. Const. art. VI, §§

some judges in 16 of these 35 states.[8] Nonpartisan open and competitive elections are held to select some or all of the judicial offices in 19 additional states.[9] Moreover, six states conduct some form of retention election for all of their judges - i.e., judges are appointed, sit for a fixed term at the end of which voters are simply asked whether the judge should be retained

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152-153; Ariz. Const. art. 6, §§ 37-42; Cal. Const. art. VI, § 16; Fla. Const. art. V § 10, 11; Ga. Const. art. VI, § VII, para. I; Ind. Const. art. 7, §§ 7, 10-11; Kan. Const. art. 3, § 6; Me. Const. art. 5, pt. 1 § 8 & art. 6, § 6; Md. Const. art. IV, § 3-4; Mo. Const. art. 5, § 25 (a), 25 (c); Mont. Const. art. VII, § 8; N.Y. Const. art. VI, §§ 2, 6, 9; S.D. Const. art. V, § 7; Tenn. Const. art. VI, §§ 3-4; Vt. Const. §§ 32, 51-52.

[8] Ala. Const. amend. 328, § 6.13; Ill. Const. art. VI, § 12; Ind. Const. art. 7, § 7; Kan. Const. art. 3, § 6; La. Const. art. V, § 22; Mich. Const. art. VI, §§ 2, 8 and 12; Mo. Const. art. 5, § 25; N.M. Const. art. VI, § 33; N.Y. Const. art. 6, § 6; N.C Const. art. IV, §§ 9, 10, 16; Ohio Const. art. 4, § 6; Penn. Const. art. V, §§ 13; S. D. Const. Art. V, § 7; Tenn. Const. art. VI, § 3 and 4; Tex. Const. art. V, §§ 2 and 7; W. Va. Const. art. VIII, §§ 8-2 and 8-5.

[9] Ariz. Const. art. 6, §§ 37-42; Ark. Const. art. 7; Cal. Const. art. VI, § 16; Fla. Const. art. 5, Section 10; Ga. Const. art. VI, Section VII.; Idaho Const. art. VI, Section 7; Ky. Const., § 117; Me. Const. art. 6, § 6 & art. 5, pt. 1, § 8; Md. Const. art. IV, § 3; Minn. Const. art VI; Miss. Cont. art. 6, § 149; Mont. Const. art. VII, § 8; Nev. Const. art. VI, § 3 and 5; N. D. Const. art. VI, § 7, 9; Okla. Const. art. VII, § 3; Ore. Const. art. VII, § 1; Vt. Const. §§ 32, 50-51; Wash. Const. art. IV, § 3; Wis. Const. art. VII, § 9.

in office.[10]

Furthermore, six states limit the term of all judicial positions to a fixed number of years and only allow for re-appointment subject to some form of legislative or commission approval.[11]

Finally, only three states - Massachusetts, New Hampshire and Rhode Island - provide for judicial service during good behavior of either lifetime appointment or appointment to age 70.[12]

Thus, the concept of judicial elections is not only consistent with the American system of justice, but it is actually utilized by the majority of states as a mechanism for either selection and/or retention of judges.[13]

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[10] Alaska Const. art. IV, § 6; Colo. Const. art. VI, § 25; Iowa Const. art. V, § 17; Neb. Const. art. 5, § CV-21(3); Utah Const. Art. 8, § 9; Wy. Const. Art. 5, § 4.

[11] Conn. Const. art. 5, § 25; Del. Const. art. IV, § 3; Haw. Const. art. VI, § 3; N. J. Const. art. VI, § VI; S. C. Const. art. V, § 7; Va. Const. art. VI, § 7.

[12] Mass. Const. Chap. III; N. H. Const. art. 73; R.I. Const. art. X, § 4, 5.

[13] It is estimated that 87% of state appellate court and 87% of state trial court judges stand for some form of election. Roy A. Schotland, *Comment*, 61 Law & Contemp. Probs. 149, 154-55 (1998).

2. The People Of Minnesota Have Consistently And Repeatedly Preferred An Elective Judicial Selection Process In Order To Maintain Public Accountability Over The Judiciary.

The then recent U.S. Supreme Court decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), played an important part in the debate on nature of Minnesota's judicial system and selection process at the State's founding Constitutional Convention in 1857. Delegates arguing in favor of an unelected judiciary supported *Dred Scott* and were eager to insulate judges from any majoritarian pressures at the ballot box in what was to be a heavily abolitionist State. *Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic)* at 495-496. Responding to these arguments, LaFayette Emmett, who would go on to become the first Chief Justice of the Minnesota Supreme Court, argued that Minnesota needed an elected judiciary in order to maintain an "elective check" on the judiciary:

> We hear a great deal of talk about an independent judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people? . . . I say than that in order to correct the errors of Judges – and it may be important to correct them – the office should be made elected. The community is capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained. . . . Sir, if the people are incapable of selecting their judges, they are also incapable of selecting [the governor] who is to appoint the

> Judges. The governor always selects men belonging to his own political party, while the people often elect them regardless of party.

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503.

Those arguing in favor of judicial elections won the day: the 1857 Minnesota Constitutional Convention adopted a Constitution specifically providing for judicial elections. Minn. Const. of 1857, Art. VI, §§ 3 and 4. Over the course of the next 145 years, Minnesota has repeatedly refused to abolish judicial elections despite several opportunities and efforts to do so.[14] Minnesota's

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[14] In 1883, Minnesota amended its Constitution to reduce the term of office for judicial candidates from seven to six years. Amendment to Art. 6, § 3, proposed by 1883 Gen. Laws and adopted at the general election of 1883: 1885 Gen. Laws at 2. In 1948, a special constitutional convention recommended wholesale revisions to the judicial article of the Constitution, including a comprehensive scheme for elections when an incumbent is seeking reelection. *See Report of the Constitutional Commission of Minnesota* 42-45 (1948). In 1956, Article VI of the Minnesota Constitution was once again amended. However, Minnesota's citizens retained judici al elections. Minn. Const. of 1956, Art. VI, §§ 8, 10, and 12. Finally, in 1972, a newly convened constitutional study commission recommended that Minnesota adopt the "Missouri retention system," a recommendation that was not adopted. *See* Judicial Branch Committee Report, *Minnesota Constitutional Study Commission* 24-25 (1972). However, as a result of the committee's recommendation, Minnesota did amend its Constitution to provide that judges stand for election at the next general election more than one year after their appointment as opposed to the then current provision requiring appointed judges stand for election at the next general election more than 30 days after

founding citizens provided for judicial elections for the express purpose of "correct[ing] the errors of Judges," and subsequent generations have considered, but refused, to relinquish this power "retain[ing] ultimate control of the judiciary in the hands of the voting public." *See Peterson v. Stafford,* 490 N.W.2d 418, 422 (Minn. 1992).

3. The Minnesota Courts' Common Law-Making And Interpretive Authority Justify Electoral Judicial Accountability.

As recently as 1998, the Minnesota Supreme Court held "[t]his court has the power to recognize and abolish common law doctrines." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) (recognizing the tort of invasion of privacy). The *Lake* Court specifically rejected "the proposition that only the legislature may establish new causes of action." *Id.* at 235. Minnesota courts have adopted numerous legal changes though their development of the common law – a quasi-legislative function.[15] Minnesota courts have also issued several recent controversial decisions striking

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appointment.

[15] *See, e.g., Anderson v. Stream,* 295 N.W.2d 595 (Minn. 1980) (abrogation of the parental immunity doctrine); *Nieting v. Blondell,* 235 N.W.2d 597 (Minn. 1975) (abolished the doctrine of soveriengn immunity); *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983) (recognized the tort of intentional infliction of emotional distress.); *McCormack v. Hankscraft Co.*, 154 N.W.2d 488 (Minn. 1967) (recognized the doctrine of strict liability in product liability cases; *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn.Ct.App. 1988) (recognized the tort of negligent transmission of herpes).

down Minnesota statutes under the Minnesota Constitution that are at odds with the decisions of other state courts and federal courts interpreting similar provisions under their respective constitutions.[16]

Judicial elections are intended to guarantee judicial countability on the exercise of these judicial law-making and interpretive powers. But in order to competently exercise their franchise, "the people themselves must provide themselves with the best possible data from which to determine their own choices." James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Doctrine,* 51 U. Pitt. L. Rev. 189, 192 (1990). The Announce Clause, by silencing judicial candidates, frustrates the very purpose of Minnesota's elective judicial system – a system adopted precisely in order to hold

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[16] See, e.g. *Doe v. Gomez,* 542 N.W.2d 17 (Minn. 1995) (implied right to privacy found under Minnesota's Constitution requires the Minnesota legislature to appropriate money to pay for the abortions of poor women); *State v. Scales,* 518 N.W.2d 587 (Minn. 1994) (Minnesota Constitution required that Minnesota police tape record confessions in order for those confessions to be admitted into evidence); *State v. Russell,* 477 N.W.2d 886 (Minn. 1991) (differences in sentencing for possession of crack as opposed to possession of cocaine violated Minnesota's equal protection clause.) *See also Doe v. Ventura,* Case No. CIV 01-000489 (Hennepin County Dist. Ct. filed May 15, 2001) (court strikes down Minnesota's sodomy statute under the Minnesota Constitution's implied right to privacy despite the fact that Minn. Const. art. I, § 16 authorizes the legislature to regulate "acts of licentiousness" and the Minnesota legislature had revised the sodomy statute as recently as 1977 as Minn. Stat. § 609.293 (1977)).

the judiciary accountable based not only on their resumes, but also based on the views they adopt on legal or political issues through their law-making and interpretive functions.

II. History of The Announce Clause.

A. History of the American Bar Association's Model Code of Judicial Conduct And the Announce Clause.

The American Bar Association adopted its first "Canons on Judicial Ethics" in 1924 ("1924 ABA Canons"). 1924 ABA Canon 30, titled "Candidacy for Office," provided, in relevant part, that the judicial candidate "should not announce *in advance* his *conclusions of law* on disputed issues *to secure class support* . . . ." Lisa L. Milord, *The Development of the ABA Judicial Code* 140-41 (1992) ("*Milord*") (emphases added). In 1972, the ABA withdrew its Canons on Judicial Ethics and adopted the Model Code of Judicial Conduct ("1972 ABA Canons"). Canon 7 to the 1972 ABA Canons, titled "A Judge Should Refrain From Political Activity Inappropriate To His Judicial Office," contained canons governing the conduct of judicial campaigns, including the announce clause at issue here.

In 1990, the ABA amended the 1972 ABA Canons. The 1990 Model Code ("1990 ABA Canons") entirely revised the Code's format, reduced the number of Canons from seven to five, eliminated the "announce clause," and replaced it with a "commitments clause," that forbids judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are

likely to come before the court." *Milord* at 99.

Nine states have incorporated the 1972 announce clause in their respective codes of judicial conduct.[17] Of these nine states, seven, Arizona, Maryland, Minnesota, Mississippi, Missouri, New Mexico, and Pennsylvania, have either an elective judiciary or a hybrid appointive and elective judiciary.[18] The other two, Iowa and Colorado, employ a retention vote in their appointive systems.

Twenty-five states have adopted judicial codes based on the 1990 commitments clause.[19] One state still

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[17] *See* Ariz. Code of Jud. Conduct Canon 5B(1)(d) (2001); Colo. Code of Jud. Conduct Canon 7B(1)(c) (2001); Iowa Code of Jud. Conduct Canon 7B(1)(c) (2001); Md. Code of Jud. Conduct Canon 5B(5) (2001); Minn. Code of Jud. Conduct Canon 5A(3)(d) (2001); Miss. Code of Jud. Conduct Canon 7B(1)(c) (2001); Mo. Code of Jud. Conduct Canon 5B(1)(c) (2001); N.M. Code of Jud. Conduct Canon 21-700B(4) (2000); Pa. Code of Jud. Conduct Canon 7B(1)(c) (2001).

[18] Moreover, a federal court narrowly construed Pennsylvania's announce clause as limited to the 1990 statements clause. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania,* 944 F.2d 137 (3d Cir. 1991).

[19] *See* Alaska Code of Jud. Conduct Canon 5A(3)(d) (2001); Ark. Code of Jud. Conduct Canon 5A(3)(d) (1997); Cal. Code of Jud. Conduct Canon 5B (2001); Fla. Code of Jud. Conduct Canon 7A(3)(d) (2001); Ga. Code of Jud. Conduct Canon 7B(1)(c) (2001); Ill. Sup. Ct. Rules Rule 67, Canon 7A(3)(d) (2001); Ind. Code of Jud. Conduct Canon 5A(3)(d) (2001); Kan. Sup. Ct. Rules Rule 601A, Code of Jud. Conduct Canon 5A(3)(d) (2001); Ky. Sup. Ct. Rule 4.300, Canon 5B(1)(c) (2001); La. Code of Jud. Conduct Canon 7B(1)(d) (2001); Me. Code of Jud. Conduct Canon 5B(2) (2001); Neb. Code of Jud. Conduct

adheres to the 1924 version.[20] Four states have clauses wholly independent of any of the ABA's modes.[21]

Lastly, eleven states have no Announce Clause or comparable provision.[22]

Canon 5A(3)(d) (2001); Nev. Code of Jud. Conduct Canon 5A(3)(d) (2001); N.Y. Code of Jud. Conduct Canon 5A(4)(d) (2001); N.D. Code of Jud. Conduct Canon 5A(3)(d) (2001); Ohio Code of Jud. Conduct Canon 7(B)(2)(d) (2001); Okla. Code of Jud. Conduct Canon 5A(3)(d) (2001); R.I. Code of Jud. Conduct Canon 5A(3)(d) (2001); S.C. Code of Jud. Conduct Canon 5A(3)(d) (2000); S.D. Stat., ch. 16-2, app., Code of Jud. Conduct Canon 5A(3)(d) (2001); Tenn. Sup. Ct. R. 10, Code of Jud. Conduct Canon 5A(3)(d) (2001); Vt. Code of Jud. Conduct Canon 5B(4) (2000); Wash. Code of Jud. Conduct Canon 7(B)(1)(c) (2001); W. Va. Code of Jud. Conduct Canon 5(A)(3)(d) (2000); Wyo. Code of Jud. Conduct Canon 5A(3)(d) (2000).

[20] *See* Mont. Code of Jud. Conduct Canon 35 § 30 (2001).

[21] *See* Ala. Canons of Jud. Ethics Canon 7B(1)(c) (2001); Tex. Code of Jud. Conduct Canon 5(1)-(2) (2001); Utah Code of Jud. Conduct Canon 5A(2), Canon 5B(4), Canon 5(C)(1) (1999); Wis. Sup. Ct. Rules Rule 60.06(3) (2001).

[22] *See* Conn. Code of Jud. Conduct Canon 7 (2001); Del. Code of Jud. Conduct Canon 7 (2001); Haw. S. Ct. Rules, Exhibit B, Code of Jud. Conduct Canon 5 (1999); Idaho Code of Jud. Conduct Canon 7 (2001); Mass. S. Ct. Rules Rule 3:09, Code of Jud. Conduct Canon 7 (2001); Mich. Code of Jud. Conduct Canon 7 (2001); N.H. S. Ct. Rules Rule 38, Code of Jud. Conduct Canon 5 (2001); N.J. Code of Jud. Conduct Canon 7 (2001); N.C. Code of Jud. Conduct Canon 7 (2001); Or. Code of Jud. Conduct, Jud. Rule 4-102; Va. S. Ct. Rules, Part 6, § III, Canon 5 (2001).

B. The History Of The Announce Clause In Minnesota.

From 1860 to 1972, Minnesota conducted judicial elections without any codes or canons restricting the speech or campaign activities of judicial candidates.[23] In 1972, the Minnesota Supreme Court, without making any factual findings, adopted the "Standards of Professional Responsibility" for judges which for the first time implemented statewide rules governing judicial campaign conduct. Minn. Rules of Court Desk Copy (West 1972).

Two years later, again without making any factual findings, the Minnesota Supreme Court adopted a Code of Judicial Conduct ("Code"), specifically modeled after the 1972 ABA Canons, which contained the Announce Clause at issue here in its Canon 7 . *See* 1974 Minnesota Code of Judicial Conduct, Canon 7.

In 1995, the Minnesota Supreme Court held hearings to determine whether to amend the Code yet again. Prior to these hearings, the Court's own Advisory Committee, as well as the OLPR and the BOJS, specifically requested that the Minnesota Supreme Court strike the Announce Clause from the Code because they believed the provision was unconstitutional. *See* Defendant BOJS' April 4, 1995 Correspondence to Minnesota Supreme Court. Declaration of William F.

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[23] In 1950, the Minnesota District Judges Association adopted the 1924 ABA Canons. However, these did not have the force of law. Moreover, they did not apply to either non-incumbent judicial candidates or Minnesota Appellate Court judges.

Mohrman, District Court Docket #69 at 4-5. In its letter, the BOJS stated that "in view of other states and federal court rulings which address the issue, the outcome [a court striking down the Announce Clause] seems inevitable." *Id.* In addition, the Supreme Court's own Advisory Committee also recommended deleting the Announce Clause:

> replac[ing] the previous blanket prohibition against announcing views on disputed legal or political issues with a prohibition against making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

See, Final Report of the Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct – June 29, 1994, p. 5. J.A. at 367.

Declining to take the advice of either its own Advisory Committee or the bodies charged with enforcing its Code, the Minnesota Supreme Court retained the Announce Clause in its 1994 amendments to the Code in what became Canon 5. Only three years later, the Minnesota Supreme Court once again amended the Code in 1997; however, the Minnesota Supreme Court left the Announce Clause in force.

III. The Announce Clause Violates Core First Amendment Values.

A. The Announce Clause Severely Restricts Free Speech Rights During Campaigns.

"Congress shall make no law. . . abridging freedom of speech or [freedom of association]. . . " U.S. Const.

Amend. I. The First Amendment applies to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903 n. 43 (1982). "Freedom of speech and the other freedoms encompassed by the First Amendment have always been viewed as fundamental components of the liberty safeguard by the Due Process Clause." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

Most important to this case, "it can hardly be doubted that the constitutional guarantee [to free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Where speech restrictions are "intimately related to the process of governing, the State may prevail only upon a showing a subordinate interest which is compelling . . . and the burden is on the government to show the existence of such an interest." *Bellotti*, 435 U.S. 786 (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

This Court has never allowed the government to proscribe truthful statements about public issues by candidates, and it has struck down laws preventing candidates from making promises, short of offering a bribe, during a campaign that the candidate either cannot keep or did not keep. *Brown v. Hartlage*, 456 U.S. 45, 53 – 54 (1982). Finally, restrictions on speech that result in sanctions to the speaker, such as those contained in the Code, are subject to even greater scrutiny. *In re Primus*, 436 U.S. 412 (1978).

Under these rulings, the Announce Clause violates the First Amendment's guarantees of free speech. First, the announce clause presents an absolute ban on even *truthful* speech by a candidate to public office during an election campaign. Second, "content based [speech] restrictions are presumptively invalid" under the First Amendment. *R.A.V. v. City of St.Paul*, 505 U.S. 377, 382 (1992). The Announce Clause ban on judicial candidates "announcing" their "views on disputed political or legal issues" is a content based speech restriction prohibiting the judicial candidates' views on any matters in dispute. Strict scrutiny is thus required.

1. The Announce Clause Severely Impinges on a Judicial Candidate's First Amendment Rights.

The Announce Clause severely impinges on the judicial candidates' free speech rights. A primary purpose underlying the application of the First Amendment to a campaign for public office is for the candidates to be able to fully and accurately communicate their views to the voters and to respond to campaign criticisms. The Announce Clause not only prevents judicial candidates from communicating to voters why the candidates should be elected, it also prevents candidates from responding to criticism directed at the candidate.

First, the Announce Clause prevents incumbent judge candidates from responding to criticism from third parties, including the media and interest groups, although incumbents inevitably have records at least in the form of written opinions that are targets for criti-

cism. Non-candidate individuals and organizations are not subject to the Announce Clause, and they are free to criticize the incumbent with impunity. The Announce Clause chills the speech of the candidate because, even if the incumbent candidate believed that a response to an opponent's attacks would not violate the clause, the opponent's ability to file an ethical complaint based on a response would have a negative effect on the incumbent's campaign.

Second, while judicial challengers may similarly be handicapped in an election campaign against an incumbent judge if they have substantial legal or political records, judicial challengers face additional problems in mounting a successful campaign against an incumbent judge as a result of the Announce Clause. While incumbent judges may openly announce their views to the electorate on disputed legal or political issues through written opinions and other means that are privileges of office, challengers are forbidden by the Announce Clause to effectively respond in kind to the incumbents' stated positions or the rationales of their opinions during the course of their campaigns.

2. The Announce Clause Impinges On the Rights of the Judicial Candidate's Supporters.

Canon 5 not only severely and directly restricts the speech of the judicial candidates, it also restricts the speech of her supporters through the "wrap around" provisions contained in Minn. Canon 5A(3)(a), (b) and (c). P. App. 133a. Paradoxically, these provisions require a candidate to try to gag family, employees and

other supporters -- in effect, to urge supporters not to support their candidacies by disclosing the candidate's general views on political or legal matters. Those who know the candidate best and who want to support the candidate cannot do so for fear of subjecting the candidate to an ethical violation.

Even if the candidate discourages family, friends, and associates, he still cannot control them. If a supporter fails to comply with the candidate's direction and announces the candidate's views on a particular issue, then an ethical complaint may be filed against the candidate in the middle of the campaign, causing obvious damage to the campaign and the reputation of the candidate. At the very least, the candidate must take time to defend himself against the charges in public and in proceedings that may take months or years beyond the election.[16]

Finally, even if the candidate and his supporters comply with the these Canons, other individuals can distribute campaign literature on the candidate "announcing" the candidate's views. In 1998, this happened to Wersal when several flyers were distributed "announcing" Wersal's views on various issues at the RPM state convention. Wersal was forced during his campaign to deny that he had engaged in this "unethical" conduct. J.A. at 48. Moreover, by vigorously denying that he sent out the flyers to the public in order to protect himself from an ethical claim, Wersal falsely

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[16] See, ethics complaint filed against Wersal in 1996. J.A. at 12-15.

created the impression with the public that he did not agree with the views contained in the flyers -- precisely the opposite result that Wersal would want if the Announce Clause did not restrict his speech. J.A. at 129.

3. The Announce Clause Impinges On Voter's Rights.

As set forth in Minnesota's Constitutional Debates, Minnesota's citizens made the judicial office elective in order to exercise popular control over the judiciary. From this perspective, the most critical First Amendment issue at stake in this case is not the judicial candidate's right to speak, but rather the public's right to hear the candidates' views from the candidates' themselves. The public's right to hear the candidate is a necessary prerequisite to self government. "It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." Alexander Meiklejohn, Free Speech and its Relation to Self-Government 26-27 (1948).

The First Amendment protects not only the rights of those who want to speak, but also the rights of those who want to hear the speaker. *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("The [First Amendment] protection afforded is to the communication, to its source and to its recipients both."). Moreover, in the context of an election campaign,"[i]t is of particular importance that candidates have the unfettered opportunity to make their general views known so that the electorate may intelligently evaluate the candidates' personal qualities

and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo,* 424 U.S. 1, 52-53 (1976).

The Announce Clause not only tramples on the rights of willing speakers, but also on the rights of Minnesota voters who would receive their campaign messages. The voters have an obvious interest in receiving information on disputed legal or political issues from judicial candidates, such as Petitioner Wersal, in order to intelligently evaluate the candidates and select who to vote for.

Minnesota citizens established an elected judiciary in order to hold judges accountable to the people in the exercise of their common law-making and interpretive powers. As Minnesota's first Chief Justice, LaFayette Emmet, argued during debate on the constitutional provision establishing an elected judiciary, Minnesota's citizens are completely "capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained [in office] . . . ."

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503.

The State's unspoken fear underlying its rationale for the Announce Clause is that the State cannot trust its own citizens. Unless judicial candidates are gagged, the State presumes that Minnesota's voters would each calculate which candidate would be most biased to the voter's preferred outcomes in various litigation scenarios and then vote on this basis. The State also presumes that voters would believe that any elected judge was "in the pocket" of whatever interest groups the voter believed the candidate seemed to cater to in the election. In fact, the State presumes that the voters are so venal and easily corrupted that not even general views on political or legal issues of candidates should be made available to them, arguing that such statements telegraphs by way of "winks and nods" implicit promises to decide particular cases in particular ways that the voter desires.

Of course, no evidence supports of any of the State's patronizing and repugnant presumptions of its own citizens - Because none exists. To the contrary, there is every reason to believe that Minnesota's electorate strongly supports judicial impartiality and will not support judicial candidates who are perceived to lack the will or capacity to impartially judge cases. In fact, Minnesota's citizens voluntarily established a judicial system that is structured throughout to ensure impartiality - Its judiciary is an independent branch of government, it has two levels of appellate review conducted by multiple judges, it requires public trials and the issuance of written public opinions, its procedural rules contain the ability to remove judges based on partiality, etc.

Moreover, citizen self-interest also would prompt the average voter to support judicial impartiality since voters can never know for certain when and if they may be charged with a crime or made a party to a civil lawsuit. Citizens would be loathe to face a prejudiced

judge in such a circumstance.[17]

Furthermore, if judicial candidates express their general views in a manner that discloses a lack of impartiality or which discloses a subsequent lack of impartiality in later opinions issued from the bench, the electorate has a right to this knowledge too so that they can vote *against* such candidates in the present or in future elections.[18]

Finally, Minnesota's and our nation's history undeniably demonstrates that Minnesota's citizens would support nothing less than an impartial judiciary. Nonetheless, even if the State's concern in this case is

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[17] Indeed, an elective system would tend to favor judicial impartiality more than an appointive system in this respect. Average voters are far less likely to believe that they "count on" any judge to rule in their favor than the "insider" elite likely to be involved in judicial selection in an appointive system.

[18] Former California Chief Justice Rose Bird's defeat in a retention election in 1986, garnering only 32% of the vote, is illustrative. In her ten years as Chief Justice, Justice Bird had refused to vote for imposition of the death penalty in every case presented to her, although the federal courts had found California's death penalty constitutional and the voters had adopted the death penalty law by constitutional referendum. Eventually, the electorate concluded that Chief Justice Bird was simply unwilling to apply California's death penalty law impartially or at all, but chose to impose her own anti-death penalty views on California regardless of the state of the law or public policy. *See* Robert S. Thompson, *Judicial Retention Election and Judicial Method: A Retrospective On The California Retention Election of 1986*, 61 So. Cal. L. Rev. 2007, 2036-2054 (1988).

that Minnesota's citizens will misperceive their own interests if judicial candidates are allowed to "announce their views on disputed legal and political issues," the First Amendment commands that the solution to this concern is more speech - Not a gag rule:

> if there be time to expose through discussion the falsehood and fallacies of the 'bad' speech , to avert the evil threatened by the 'bad' speech by the processes of education, the remedy to be applied is more speech, not enforced silence."

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. Concurring).

B. The Announce Clause Is Unconstitutionally Vague.

The State, the District Court, and the Eighth Circuit have all proposed different glosses on the Announce Clause. *See* Brief of Republican Party of Minnesota at IIIA(1). However, the interpretations offered do not substantially limit the scope of the clause, cannot be justified by the plain language or context of the clause, or create and compound confusion in the language of the clause. *See id.*

The Eighth Circuit asserts that, although the Announce Clause forbids announcing views on disputed legal or political issues, "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." P. App. 54a. Yet, as Judge Beam in dissent points out, "stare decisis, nar-

row or strict construction, original intent and substantive due process" are almost certainly "disputed legal issues," that are "likely" to come before a court. P. App. 77a. Allowing that the Announce Clause permits "general discussions of case law" or "judicial philosophy"simply renders the clause incomprehensible and vague.

The limiting constructions of the Announce Clause offered by the courts below, thus, render the clause less likely to give "fair notice to those to whom [it] is directed" what speech is forbidden. *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972). Failure to provide a speaker with fair notice of forbidden speech would in itself render the Announce Clause unconstitutionally vague. But special precision in regulation of speech should be required when the prohibited speech is that of a candidate in the course of an election campaign. The level of imprecision and confusion here clearly places the Announce Clause beyond constitutionally permissible limits.

As Mr. Wersal testified, because of the breadth and lack of specificity of the Announce Clause, the only proper course for a judicial candidate is silence. J.A. 129. *See also Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (7th Cir. 1993). The First Amendment does not countenance the imposition of silence on candidates campaigning for election.

CONCLUSION

On the basis of the foregoing, Petitioners pray this Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,

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